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In the

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, Secretary of the Interior, et al.,
Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,
Respondents.

On Writ of Certiorari to the
District of Columbia Circuit Court of Appeals

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ET AL. IN SUPPORT OF RESPONDENTS

* ROBIN L. RIVETT
JENNIFER M. DEMING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amici Curiae

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, ET AL. IN SUPPORT OF RESPONDENTS

IDENTITY AND INTEREST OF AMICI

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself and California Chamber of Commerce, California Forestry Association, California Licensed Forester's Association, Forest Resources Council, Forest Landowners of California, Western Forest Industries Association, Western Growers Association, California

Cattlemen's Association, California Mining Association, Consulting Engineers and Land Surveyors of California, CalMat, and California Business Properties Association (Pacific Legal Foundation, *et al.*) in support of respondent, Sweet Home Chapter of Communities for a Great Oregon (Sweet Home). Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

This case challenges the validity of United States Fish and Wildlife Service's (USFWS), "harm" regulation (50 C.F.R. § 17.3 (1992)) which forbids habitat modification as an illegal "take" under Section 9 (16 U.S.C. § 1538) of the Endangered Species Act of 1973 (ESA).[1] According to USFWS, such disturbance of habitat might result in injury or death to a member of a species protected by the Act. Amici Pacific Legal Foundation, *et al.*, are organizations which represent a cross-section of California's agricultural, business and natural resource industry interests, and whose members are directly affected by USFWS' "harm" regulation. Amici Pacific Legal Foundation, *et al.*, argue that USFWS' "harm" regulation goes far beyond the intended scope of Section 9 which was designed by Congress merely to forbid human predatory activities directed at listed species.

PLF is a nonprofit, tax-exempt California corporation organized for the purpose of engaging in public interest litigation. Policy for the Foundation is set by a Board of Trustees which evaluates the merits of any contemplated legal action and authorizes action only where PLF's position has broad support within the general community. The filing of an amicus curiae brief has been authorized in this matter.

California Chamber of Commerce is the state's largest broad-based nonprofit membership organization

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[1] Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended in 16 U.S.C. §§ 1531-2544).

which joins the interests of business, industry, and agriculture to work for positive action on key legislative and regulatory issues affecting California's economic and job climate. Membership includes more that 8,000 private employers, including 160 trade associations and 430 local chambers of commerce.

California Forestry Association (CFA) is comprised of 38 forest products companies. CFA's members account for over 70% of the state's forest products. CFA has 79 associate and affiliate members representing a broad array of individuals and companies interested in the well-being of the forest products industry.

California Licensed Forester's Association (CLFA) is a professional organization made up of over 700 licensed foresters and other resource professionals. CLFA represents its members on issues that concern forestry practice in California and provides educational conferences and workshops for its members.

Forest Resources Council (FRC) was formed to strengthen the voice of private forest landowners and the allied industries which process and market forest products in California. FRC's focus is on private forest lands and their increasing importance to future timber production and forest products supply.

Forest Landowners of California (FLC) was formed in 1975 to represent the interests of the state's 30,000 nonindustrial, private timberland owners. With membership in all California counties, FLC is active in seeking regulatory relief and protecting the property rights of its members, as well as providing informational and educational services.

Western Forest Industries Association (WFIA), established in 1947, represents small, independent forest products manufacturers to help maintain a stable and economic supply of timber from public and private lands.

Presently, WFIA represents about 100 businesses throughout the Western states.

Western Growers Association (WGA), formed in 1926, is a nonprofit corporation representing the growers, packers, and shippers of fresh fruits, vegetables, and nuts produced in California and Arizona. WGA members are responsible for handling more than 80% of the fresh vegetables and a majority of fresh fruits and nuts produced in California and Arizona.

California Cattlemen's Association (CCA), a nonprofit corporation, founded in 1917, represents the state's beef cattle industry in legislative and regulatory affairs. Beef cattle producers operate on over 40 million of California's 100 million acres and contributed $1.5 billion to the state's $19.7 billion agricultural economy in 1993. The industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California.

California Mining Association (CMA) is comprised of mining companies located throughout the State of California which ranks third amongst all states in mineral production. CMA's membership includes large and small mining operations that are responsible for the majority of the minerals produced in California. CMA's membership also includes members engaged in mining-related work such as consultants, lawyers, suppliers, and regulators.

Consulting Engineers and Land Surveyors of California (CELSOC) is a statewide, nonprofit association of 950 consulting engineering and land surveying firms. Approximately 55% of CELSOC's members are deeply involved in the early stages of planning and designing needed for residential and public works projects.

CalMat is the largest producer of aggregate building materials in the Western United States. CalMat is recognized for state of the art mining techniques, regulatory compliance, award winning land reclamation projects, and

nationally and internationally recognized habitat restoration programs.

California Business Properties Association (CBPA) is a nonprofit association whose members include developers, builders, lenders, commercial property owners, real estate agents, major retailers, and professional service corporations. With its 5,000 members, CBPA represents the largest consortium of commercial and industrial real estate interests in the State of California.

The proper resolution of this case is vital. Due to its favorable climate and geographical location, California plays host to myriad species protected under the ESA. As of 1994, California provides a home for 128 federally listed species and nearly 1,000 candidates for listing. Endangered Species Blue Print, NWI Resource, Vol. 5, Issue I, Fall 1994. Because it protects endangered species habitat on private property, USFWS' "harm" regulation as applied in this state forbids most types of otherwise permissible, ordinary land use activities on millions of acres of private land. Numerous astonishing examples exist detailing the enormous costs and administrative burdens private landowners have been forced to shoulder as a result of USFWS' "harm" regulation.

1. Taung Ming-Lin, is a Taiwanese immigrant residing in Kern County, California. He was criminally charged with violating Section 9 for plowing his 723 acre farm and purportedly destroying the habitat of ESA-protected Tipton kangaroo rats, blunt-nosed leopard lizards, and San Joaquin kit foxes. Mark Arax, *Immigrant Farmer's Woes Galvanize Conservatives*, L.A. Times, June 10, 1994, at A1. Mr. Lin's land had not been designated as "critical habitat" for any of the three species at issue, but nevertheless his disc and tractor were confiscated under the asset forfeiture provision of Section 11 of the ESA (16 U.S.C. § 1540(e)(4)(B)) by USFWS.

In order to mitigate the claimed "temporary habitat disturbance" caused by Mr. Lin's discing activity, USFWS suggested on October 25, 1994, that the United States Attorney's Office request that Mr. Lin transfer title to, or a conservation easement over, 363 acres of land "of suitable habitat in the project vicinity ... in perpetuity ... to an approved land management entity" and that Mr. Lin also pay $172,425 to the agency for the management and enhancement of the land. Letter from Joel A. Medlin, Field Supervisor for USFWS, to Karen A. Kalmanir, Assistant U.S. Attorney (October 25, 1994) (on file with Pacific Legal Foundation). Such extortion tactics by USFWS have become all too common.

For Mr. Lin the entire ordeal threatens to destroy the $1.6 million investment he made when he purchased his ranch from Tenneco West, Inc., in 1991. As stated by Mr. Lin, "'I do not understand ... if the government wants this land for endangered species -- why doesn't the government buy it?'" Susan Towers, *ESA Turns a Dream to Ashes*, Bakersfield Californian, Jan. 9, 1994, at A4.

2. In October, 1993, wildfire swept through Southern California, charring 25,100 acres of land and destroying 29 homes. David W. Meyers, *Ire After the Fire*, L.A. Times, Nov. 16, 1993, at D1. As reported to the nation on November 19, 1993, by Hugh Downs and Barbara Walters, most homes were lost because property owners were prohibited from discing firebreaks around their properties. Why? Because they were considered to provide habitat for the Stephen's kangaroo rat, an animal protected under the ESA. *ABC News 20/20* (Nov. 19, 1993, Transcript 1349). The properties in question were not designated "critical habitat" for the protected species, rather, they were in a "rat study" area in Riverside County, California.

The people who lost their homes may have been able to save them had they ignored USFWS' warning that discing

firebreaks would modify the habitat of the kangaroo rat and thereby violate the ESA. Michael Rowe, a Riverside real estate agent, ignored USFWS' warnings and disced a swath of land around his home as the blazes approached. The flames did not jump the break and his house was saved. David W. Meyers, *Ire After the Fire*, L.A. Times, Nov. 16, 1993, at D3. Unfortunately 29 other homeowners were not as lucky.

3. The California timber industry has suffered staggering losses as a result of USFWS' regulation protecting endangered species habitat at the expense of private property owners.

The Wagner Corporation, a small family owned timber company established in Stockton, California, in 1895, owns and manages 3,400 acres of forest land near Garberville, California. During the 1993 and 1994 forest season, Wagner found a pair of nesting spotted owls (protected under the ESA) in the middle of an area then scheduled for logging. To prevent a "take" by modifying habitat Wagner could log merely 45% of the trees selected for harvesting. As a result, the company's revenue losses approached $200,000. Since the area is on a 17-year rotation, Wagner will not be able to harvest the area again until the year 2012.

Eel River Sawmills, Inc. (ERS), is another small timber company located in Fortuna, California. Founded in 1948, ERS also has been economically injured by USFWS' determinations regarding the habitat needs of the spotted owl on private lands. Specifically, ERS has been required to leave untouched and standing several million feet of old-growth Douglas fir because according to USFWS any amount of harvest would harm habitat and thus result in the "take" of resident owls. The inability to properly manage its timberlands, in the name of species protection, has caused ERS to suffer considerable economic loss.

Schmidbauer Lumber, Inc., located in Eureka, California, has also consulted with a private property owner who has suffered significant economic loss. In one situation, even though the property owner had completed all permitting including all surveys for protected spotted owl and marbled murrelet necessary to proceed with a harvest under a state Non-Industrial Timber Management Plan, the property owner was told not to proceed because it was discovered that a *neighboring* property contained murrelet sightings. In order to proceed, a 300-foot no-harvest buffer (comprising 15 acres) and a seasonal harvest restriction (April 1-September 15) of one quarter mile buffer (40 acres) were required to be set aside to protect the murrelet. This habitat protection restriction resulted in a significant economic loss for the landowner.

Most recently, in *Murrelet v. Pacific Lumber Company*, Doc. No. C-93-1400-LCB (February 27, 1995), the United States District Court for the Northern District of California issued a permanent injunction barring Pacific Lumber Company from logging a 137-acre parcel of land because the logging could eliminate actual and potential habitat and thus "harm" and "harass" the marbled murrelet. In a footnote to his 60-page opinion, Judge Bechtle ruled that *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (which directly conflicts with the Court of Appeals' decision in the case at bar) allows "significant habitat modification or degradation" to be considered harming an animal, and thus it is a "take." Slip op. at 2. Accordingly, the private property of Pacific Lumber has been rendered valueless.

4. The California building industry and ultimately the public have also suffered startling losses at the hands of USFWS' species habitat protection program on private property. From San Bernardino, California, comes the almost unbelievable story of a "conflict" between the ESA

and the construction of the San Bernardino County Medical Center. In order to mitigate for the presence of *eight* Dehli Sands Flower-Loving Flies, the County had to move and redesign the much-needed medical facility, in addition to providing 1.92 acres of protected habitat. The expenditure was $3,310,199 total or $413,774.25 per fly and resulted in a one-year construction delay. This cost is equivalent to the average cost of treatment of 494 inpatients or 23,644 outpatients.

In Sacramento, California, Sares Regis Group, Inc., is currently in its *seventh* year of attempting to get approval to develop a 1,225 acre planned community. The planned community will meet current and future area needs and is completely consistent with the Sacramento County General Plan. The Sunrise-Douglas project would concentrate badly needed residential housing near both a major employment area and public transit, and is expected to bring badly needed new jobs to the Sacramento economy. The project contains some 85 acres of vernal pools[2] and other marginal wetlands.

Enter the fairy shrimp, tiny invertebrates found by the millions in vernal pools. In September, 1994, varieties of fairy shrimp and the vernal pool tadpole shrimp were listed by USFWS as protected species because of USFWS' unverified belief that habitat for the species is in jeopardy. Fairy shrimp are prolific and are found in vernal pools, man-made stock ponds, drainage ditches, and even tire ruts. One of four fairy shrimp listed as endangered and one that is considered threatened, are found on the Sunrise-Douglas

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[2] Vernal pools are shallow depressions in the ground that fill with water during fall and winter rains and then evaporate in the spring. The water does not percolate downward because of an impervious subsurface layer such as clay, hardpan, or volcanic stratum. Thus, vernal pools are seasonal water bodies that generally do not exist in the hot and dry summer months.

property. Sares-Regis must now modify its wetland mitigation plan to provide additional habitat for the fairy shrimp. The mitigation plan already calls for setting aside 30% of the property as an open space and vernal pool preserve and for creating vernal pools offsite at a rate of 1.3 acres for each acre filled by the project. Now the only question is whether this important project can be kept alive in the face of increased habitat demands by USFWS.

5. The largest producer of aggregate building materials in the Western United States has encountered nearly a decade of problems with the ESA which has consistently thwarted and delayed the company's efforts to mine a parcel of land in San Bernardino, California. In the San Bernardino\Cajon Creek project, CalMat has voluntarily set aside a six-mile habitat corridor, consisting of over 1,670 acres, to protect Riversidian alluvial fan sage scrub. Numerous biological surveys have been conducted by experts but not one has found even a single endangered species on the site. Nevertheless, USFWS warned in a 1994 letter that CalMat has "taken" the Santa Ana River wooly star, the slender-horned spineflower and the California gnatcatcher by virtue of its mining activities. There is no showing that CalMat's activities have or will kill or injure any protected species yet USFWS has invoked its "harm" regulation. This action is clearly designed to protect uninhabited, potential habitat and to chill CalMat's mining activities. USFWS has not yet taken any legal action against CalMat.

The list of examples of landowners whose private property rights have been transfixed by USFWS' "harm" regulation goes on and on. Due to the incredible importance of this issue for private property owners nationwide, amici Pacific Legal Foundation, *et al.*, provide this amicus curiae brief in support of respondents.

OPINION BELOW

The March 11, 1994, opinion of the Court of Appeals issued after granting respondents' petition for rehearing (Pet. App. 1a-41a) is reported at 17 F.3d 1463. The August 12, 1994, statements accompanying the Court of Appeals' denial of petitioners' petition for rehearing and suggestion for rehearing en banc (Pet. App. 89a-99a) are reported at 30 F.3d 190. The July 23, 1993, initial opinion of the Court of Appeals (Pet. App. 42a-72a) is reported at 1 F.3d 1. The opinion of the District Court (Pet. App. 73a-88a) is reported at 806 F. Supp. 279.

STATEMENT OF THE CASE

The ESA is intended to preserve and protect species identified within the meaning of the Act as "endangered" (16 U.S.C. § 1532(6)) or "threatened" (16 U.S.C. § 1532(20)). Species are protected through three basic mechanisms: (1) land acquisition of nonfederal property by the federal government (Section 5, 16 U.S.C. § 1534); (2) compelling federal agencies to act in a manner which ensures their actions are not likely to jeopardize the continued existence of a listed species or modify its critical habitat (Section 7, 16 U.S.C. § 1536(a)(2)); and (3) prohibiting any person from "taking" a listed species (Section 9, 16 U.S.C. § 1538).

The ESA defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).[3] Although the ESA itself does not further define the terms listed under the congressional

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[3] The prohibitions set forth in Section 9 apply to private as well as public land, regardless of whether critical habitat has been designated. 16 U.S.C. § 1538(a)(1)(B).

definition of "take," USFWS has promulgated a regulation defining the term "harm" as follows:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3 (emphasis in original).

The question raised in this case is whether USFWS' definition of "harm" as inclusive of habitat modification exceeds the scope of the "take" provision of Section 9 of the ESA. The proper resolution of this issue is critical as it touches millions of acres of land nationwide. As stated by the *Sweet Home* court in its *per curiam* denial of a petition for rehearing and suggestion for rehearing *en banc* of its prior decision:

> Extending the word "harm" to reach habitat modification as ... conceived [by USFWS] carries [Section] 9's prohibition far beyond the reach effected by all the other terms used in the definition; it applies to every citizen duties the [ESA] expressly imposed only on federal government agencies .... The extension vests [USFWS] with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas. ... Congress clearly did not hang so massive an expansion of government power on so slight a nail as § 9.

Pet. App. 95a-96a (citations omitted).

For the reasons stated below, amici Pacific Legal Foundation, *et al.*, support respondents' request that this Court affirm the decision of the United States Court of Appeals for the District of Columbia Circuit on March 11, 1994, wherein that court struck down USFWS' "harm" regulation as overly broad and neither clearly authorized by Congress nor a reasonable interpretation of the ESA. Pet. App. at 3a.

SUMMARY OF THE ARGUMENT

In reviewing an agency's construction of a statute a court must first determine whether the construction is clearly authorized by Congress or, if not, whether the construction constitutes a reasonable interpretation of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Applying the first step of *Chevron*, USFWS' "harm" regulation which defines habitat modification as a "take" is not clearly authorized because it directly conflicts with the meaning and intent of the ESA. Specifically, under the basic statutory construction principles of *noscitur a sociis* and *ejusdem generis*, USFWS' broad definition of "harm" is fundamentally inconsistent with the other words Congress used to define "take."

Applying the second step of *Chevron*, it becomes clear that USFWS' "harm" regulation is not a reasonable interpretation of the ESA. First the legislative history of the ESA shows that Congress did not intend to punish the modification of habitat on private lands as an illegal "take" under Section 9. Rather, the text and legislative history of the ESA prove that Congress intended to place habitat protection burdens on the federal government alone and intended Section 9 to prohibit every member of society from engaging in predatory activities directed toward protected species. Additionally, USFWS' interpretation of Section 9 is unreasonable because it renders the habitat protection measures contained in Sections 5 and 7 superfluous.

USFWS' interpretation of "harm" is also unreasonable as it criminalizes otherwise ordinary land use activities and conflicts with the penalty provisions of Section 11. Finally, the "harm" regulation is unreasonable because its terms and application contravene the Fifth Amendment to the United States Constitution.

ARGUMENT

I

CONGRESS CLEARLY INTENDED THAT SECTION 9 "TAKE" PROHIBITIONS WOULD APPLY ONLY TO THOSE ACTIONS WHICH INVOLVE HUMAN PREDATION OF LISTED SPECIES

In reviewing USFWS' interpretation of Section 9 of the ESA, this Court must initially determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842. "The judiciary is the final authority on [matters] of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9. *See also K Mart Corporation v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("'The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress'"). Thus, if this Court finds that the word "harm" in the context of the "take" prohibition of Section 9 clearly does not include habitat modification as encompassed in USFWS' harm regulation, then this Court must strike down USFWS' regulation.

Under one statutory construction principal, *noscitur a sociis*, "a word is known by the company it keeps." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). This principle "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Id.* In

employing this rule, a court should look for a common thread among the listed words as "'"words grouped in a list should be given related meaning."'" *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990).

Since "harm" can have both narrow and broad meanings, the Court of Appeals below examined the term "harm" in the context of its use in the ESA. Pet. App. at 3a-8a. As noted above, the ESA defines the term "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). Applying the principle of *noscitur a sociis*, the Court of Appeals looked to the word "harm"--the indefinite word in the congressional list of acts defined as a "take"--and attempted to derive the term's meaning from its neighboring words. Pet. App. at 4a-5a. The court noted that each of the other terms in the ESA's definition of "take" involve "a substantially direct application of force, which [USFWS'] concept of forbidden habitat modification altogether lacks." *Id.* at 5a-6a. As stated by the court:

> Setting a trap for an animal certainly modifies its habitat, as in a slightly different sense, does firing bullets at it. This obviously does not imply that habitat modifications as the Service uses the term are also encompassed.

Id. at 6a n.1.

Parsing out each of the terms described by Congress as a "take" under 16 U.S.C. § 1532(19), by their dictionary definition proves the accuracy of the Court of Appeals' conclusion in this case. The following definitions are taken from Webster's Ninth New Collegiate Dictionary (1986): (1) Capture: "to take captive ... to gain control of ... by force;" (2) Collect: "to bring together into one ... place;" (3) Harass: "to worry and impede by repeated raids ... to annoy persistently;" (4) Harm: "physical or mental damage,

injury;" (5) Hunt: "to pursue for food or in sport;" (6) Kill: "to deprive of life ... to slaughter;" (7) Pursue: "to follow in order to overtake, capture, kill, or defeat;" (8) Shoot: "to wound or kill with a missile discharged from a bow or firearm;" (9) Trap: "to catch or take ... in a restricted position, confine;" (10) Wound: "an injury to the body."

Each of the terms accompanying "harm" involve activities directed by one particular force against another. Applying the principle of *noscitur a sociis* it is obvious that Congress only intended "take" to include human predatory activities directed toward protected animals.

The Ninth Circuit recently applied the principle *noscitur a sociis* in *United States v. Hayashi*, 5 F.3d 1278, 1282 (9th Cir.), *amended, reh'g denied*, 22 F.3d 859 (9th Cir. 1993), to its interpretation of the Marine Mammal Protection Act (MMPA) as requiring a "direct and significant intrusion[] upon [a] mammal's ordinary activities" in order to find that a mammal had been "harassed" within the meaning of that Act. The court stated:

> The statute groups "harass" with "hunt," "capture," and "kill" as forms of prohibited "taking." The latter three each involve direct, sustained, and significant intrusions upon the normal, life-sustaining activities of a marine mammal; killing is a direct and permanent intrusion, while hunting and capturing cause significant disruptions of a marine mammal's natural state. Consistent with these other terms, "harassment," to constitute a "taking" under the MMPA, must entail a similar level of direct and sustained intrusion.

Hayashi, 5 F.3d at 1282. Under its interpretation, the *Hayashi* court accordingly overturned defendant's conviction for firing a rifle twice into water behind some porpoises because he had not "harassed" the porpoises within the

meaning of the MMPA. *Hayashi*, 5 F.3d 1282. Analogizing from the language in *Hayashi*, the nine verbs accompanying "harm," mainly, "harass, ... pursue, hunt, shoot, wound, kill, trap, capture, or collect," 16 U.S.C. § 1532(19), all involve a substantially direct application of force which USFWS' habitat modification definition lacks altogether.[4]

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[4] USFWS argues in its brief on the merits that "the ruling in *Hayashi* is of no continuing importance, because in the MMPA Amendments of 1994 ... Congress enacted a definition of 'harassment' that is more expansive than the Ninth Circuit's interpretation in *Hayashi*." Brief for Petitioners at 26 n.13 (Brief of Pet.). USFWS' attempt to distinguish *Hayashi* on this basis is a red herring.

The amendments referred to by USFWS added section 16 U.S.C. § 1362(18) to the MMPA which defines the term "harassment" to mean

> any act of pursuit, torment, or annoyance which--(i) has the potential to injure ... or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration,breathing, nursing, breeding, feeding or sheltering.

Obviously, the *Hayashi* court's finding that "'harassment' must entail a ... direct and sustained intrusion" (*Hayashi*, 5 F.3d at 1282) is of continuing vitality. In order to be found liable for "taking" a marine mammal by "harassment" an individual must be found to have pursued, tormented or annoyed a protected marine mammal to such an extent as to have potentially injured the mammal or to have disturbed the mammal's normal behavioral patterns. If anything, the addition of Section 1362(18) to the MMPA merely validates the *Hayashi* court's decision. This interpretation is consistent with the legislative history of 16 U.S.C. § 1362(18) which does not even mention the section as altering the court's decision in *Hayashi* and merely states: "This section

(continued...)

Similarly, the principle of statutory construction known as *ejusdem generis*, counsels a narrow reading of the term "harm."[4] Under this principle, where general words accompany words of specific meaning, such general words are construed as applying only to actions of the same class as those specifically mentioned. *Hughey v. United States*, 495 U.S. 411, 419 (1990). Applied to the congressional definition of "take," the term "harm" can only be reasonably interpreted to include those actions that are directed against, and likely to kill or injure, individual wildlife.

Thus, under the basic statutory construction principles of *noscitur a sociis* and *ejusdem generis*, this Court should strike down USFWS' overly broad definition of "harm" as encompassing habitat modification.

II

USFWS' INTERPRETATION OF "HARM" AS EXTENDING TO HABITAT MODIFICATION IS AN UNREASONABLE INTERPRETATION OF THE ESA

A. Under the Rule of Lenity, This Court Must Construe any Ambiguities in the Congressional Meaning of "Take" in Favor of Respondents

In the event that this Court finds that Section 9 of the ESA or the intent behind it is ambiguous with respect to the validity of USFWS' definition of "harm," under *Chevron's* second step, this Court must decide whether the agency's understanding of the statute is based on a permissible construction or reasonable interpretation of the statute. *Chevron*, 467 U.S. at 843.

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[4] (...continued)
makes technical corrections to the MMPA." S. Rep. No. 220, 103rd Cong., 2d Sess. 17-18 (1994), *reprinted in* 1994 U.S.C.C.A.N. 518, 535-536.

USFWS argues that its regulatory interpretation of "harm" is entitled to enormous amounts of deference. *See* Brief for Pet. at 18-19. However, since violations of Section 9 of the ESA entail both civil and criminal consequences, the rule of lenity counsels otherwise. This rule is triggered if a statute is found to be ambiguous after a court consults traditional canons of statutory construction. *United States v. Shabani*, 513 U.S. ___, 130 L. Ed. 2d 225, 231 (1994). Under the rule of lenity, if an ambiguous statute imposes criminal liability, its application must be *narrowly construed* to protect parties potentially subjected to the liability. *Id.* The rule applies to criminal statutes, even when construed in the civil context. *See United States v. Thompson/Center Arms Co.*, 504 U.S. ___, 119 L. Ed. 2d 308, 319-320 (1992) (applying rule of lenity in a civil context); *Crandon v. United States*, 494 U.S. 152, 157-58 (1990) (applying rule of lenity in a "civil remedy" context). The rule of lenity ensures "both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon*, 494 U.S. at 158.

If this Court is unsuccessful in discerning Congress' intent as to the scope of the "take" provision set forth in Section 9 of the ESA, it should apply the rule of lenity and narrowly construe Section 9 to resolve the surrounding ambiguity.

B. The Legislative History of Section 9 Does Not Support USFWS' Interpretation

The legislative history of the ESA supports a rejection of USFWS' extension of Congress' Section 9 "take" prohibition to encompass habitat modifications.

When Section 9 was originally before the Senate Commerce Committee, a definition of "take" was rejected which would have expressly included habitat modification. The bill, introduced before the committee, defined "take" as including "'the destruction, modification, or curtailment of

[a species'] habitat or range.'" Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 before the Subcomm. on Environment of the Senate Comm. on Commerce, 93rd Cong., 1st Sess., at 27 (1973) (cited in Pet. App. at 9a-10a (brackets in original)). The committee was well aware of this provision as a number of persons appearing before the subcommittee to whom the bill was introduced stressed the importance of the habitat modification language. *See* Pet. App. at 10a (discussing selected comments).

Nonetheless, the "take" definition which was submitted to the full Senate omitted reference to habitat modification, instead defining "take" to mean "'harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'" *See* 119 Cong. Rec. 25,663 (July 24, 1973) (cited in Pet. App. at 10a). The deletion can be construed as purposeful in light of the specific hearing testimony which emphasized the importance of the habitat modification language in the "take" prohibition. *See John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. ___, 126 L. Ed. 2d 524, 540 (1993) (finding similarly unexplained deletion to be highly probative of the reach of a statute).

Additionally, "harm" was not included in the original definition of "take" reported by the Senate Committee. Rather, "harm" was added on the Senate floor, as part of a group of "technical and clarifying amendments," and its meaning was not debated at any time. 119 Cong. Rec. 25,682-83 (July 24, 1973). It is unreasonable to conclude that Congress would have so greatly expanded the scope of Section 9's "take" provision merely through an undebated technical amendment. Senator Tunney, Chair of the Committee on Merchant Marine and Fisheries which reported the ESA bill and sponsor of the amendment to add the term "harm" to the definition of "take," had stressed the difference between habitat modification and actions

prohibited as takings when introducing the bill to the full Senate:

> Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption or other purposes. The provisions in [this bill] would prohibit the commerce in or the importation, exportation, or taking of endangered species except where permitted by the Secretary.

119 Cong. Rec. 25,669 (July 24, 1973) (cited in Pet. App. at 9a). Since Senator Tunney's committee had struck "habitat modification" from the original ESA definition of "take" (Pet. App. at 9a-10a (discussion deletion of proposed language)), and since Senator Tunney had stressed the difference between habitat modifications and takes to the full Senate, it would be unreasonable to conclude that Congress intended to expand the scope of the prohibited takes to include habitat modifications merely through the addition of the undebated term "harm" as a technical amendment.

Furthermore, Congress' 1982 amendments do not support USFWS' argument that Congress' addition of Section 10 to the ESA constituted a ratification of USFWS' definition of "harm." *See* Brief of Pet. at 34. In 1982, Congress added Section 10 which authorizes USFWS to issue permits for "any taking otherwise prohibited by section [9] ... if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C § 1539(a)(1)(B). In order to acquire a Section 10 permit, the applicant party must submit a habitat conservation plan (HCP) which specifies the impact that will likely result from the taking and must outline steps that the applicant will take to minimize and mitigate such impacts. 16 U.S.C. § 1539(a)(2)(A).

When it added Section 10, Congress did not alter the Section 9 "take" provision, nor did it explicitly endorse the "harm" regulation. Rather, as stated by the court below, the language set forth in Section 10 merely "implies that *some* prohibited takings are 'incidental' to otherwise lawful activities. ... The trapping of a nonendangered animal, for example, may incidentally trap an endangered species." Pet. App. at 11a (emphasis in original). Thus Section 10 is in harmony with Section 9 because it merely sets up a program under which private parties can get advance permission from USFWS to engage in projects which might otherwise violate the "take" provision of Section 9 by directly killing or injuring listed animals. In exchange for this immunity, the applicant party must agree to offset or mitigate the impact of his activity on the affected species by agreeing to create an HCP.

Furthermore, as discussed at length by the Court of Appeals below, assuming as true the premise that USFWS' interpretation of "harm" violated the original statutory language of Congress in 1973, Congress could not acquiesce in that regulation or alter the scope of the statute without substantively amending the text of Section 9. Pet. App. at 17a. Mere reenactment of an Act without any specific endorsement of an agency's regulation is not enough to ratify a regulation. As stated by the Court of Appeals, "[*i*]*f* the 1982 Congress had *reenacted* the pertinent sections of the ESA *and* 'voice[d] it approval' of [USFWS'] interpretation, it might be appropriate to treat the reenactment as an adoption of that interpretation." Pet. App. at 23a (emphasis in original). However, Congress did not reenact Section 9 nor voice its approval of the "harm" regulation. *Id.* at 23a-24a. Since "the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Leary v. United States*, 395 U.S. 6, 25 (1969).

USFWS' argument, if accepted by this Court, means in essence that when Congress amends a statute it ratifies all prior regulations, erroneous or not, which interpret and administer any part of that statute. Thus, if Congress revisits an Act for purposes of amendment, USFWS essentially makes the argument that Congress must literally review *each and every agency regulation* interpreting and administering that Act to determine such regulations' conformity with the Act. Obviously, congressional responsibilities do not include such onerous and detailed types of reviews and examinations.

Thus, the legislative history of Section 9 indicates that USFWS' definition of "harm" is improper as contrary to the congressionally intended definition of the term "take."

C. USFWS' Interpretation of "Harm" Creates a Conflict Between Section 9 and Sections 5 and 7

Another reason for rejecting of USFWS' definition of "harm" is the definition's inconsistency with the overall framework of the ESA. It is undisputed that the ESA is concerned with two major causes of species decline: (1) the commercial and sport/game taking of individual animals, and (2) the destruction and degradation of protected species' habitats. 46 Fed. Reg. 29,490, 29,491 (June 2, 1981). The Act creates a bifurcated system to deal with these two distinct categories of problems. Specifically, Section 9 is designed to deal with the concern for "commercial and sport/game taking of individual animals" while Sections 5 and 7 address the concern for "the destruction and degradation of protected species' habitats."

Section 7 requires federal agencies to insure that *actions they take* are not likely "to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species." 16 U.S.C. § 1536(2). Section 5 authorizes federal land acquisitions of nonfederal properties as an additional means for preserving listed

species' habitat. Taken together, these two sections address Congress' concern for the threatened destruction of habitat for listed species. 46 Fed. Reg. at 29,491.

On the other hand, Section 9 was designed to prohibit all human activities that constitute an actual, direct taking of an endangered species of fish or wildlife. The terms set forth in the statute, "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect," 16 U.S.C. § 1532(19), represent forms of conduct that are directed against and likely to kill or physically injure wildlife. This interpretation is supported in the legislative history of Section 9. As stated by Representative Sullivan, whose committee reported the House bill:

> Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so.

119 Cong. Rec. 30,162 (Sept. 18, 1973) (remarks of Rep. Sullivan, House floor manager) (cited in Pet. App. at 9a). *See also* statement by Senator Tunney 119 Cong. Rec. 25,669 (July 24, 1973) (cited in Pet. App. at 9a).

A statute should not be construed in a way that renders other provisions of the statute superfluous. The courts "are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law." *Mackey v. Lanier Collections Agency & Service, Inc.*, 486 U.S. 825, 837 (1988).

USFWS' interpretation of "harm" renders ESA Section 7 superfluous. If Section 9 truly prohibits habitat modification by any public or private entity as well as human predation of any listed species, then Section 7(a)(2)'s separate directive to federal agencies to not "jeopardize the

continued existence" of a listed species in the collective sense or cause the "destruction or adverse modification of [designated critical] habitat" (16 U.S.C. § 1536(a)(2)) of such species becomes meaningless because such activities are already forbidden to federal agencies under Section 9.[5] Thus, USFWS' definition of "harm" transposes to the private sector habitat protection duties which the ESA was intended to place only on the federal sector.[6]

In fact, USFWS' "harm" regulation expands Section 9 to such an extent that Section 9 is now larger and more encompassing than Section 7. While a federal action may proceed if it does not jeopardize an entire listed species, under Section 9 federal actions constitute forbidden "harm" if they injure only one member of a listed species. Additionally, while Section 7 merely forbids modification of designated critical habitat, Section 9, as interpreted by USFWS, now forbids habitat modification in *any geographical region that can be or is currently occupied by a listed species*! As pointed out in Section 3, "critical habitat shall *not* include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). However, USFWS' harm regulation makes no distinction between geographical and

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[5] Section 9 applies to "any person" (16 U.S.C. § 1538(1)). The ESA defines "person" as both private individuals and groups and also as "any officer, employee, agent, department, or instrumentality of the Federal Government." 16 U.S.C. § 1532(13). Thus, Section 9 applies to federal agencies as well as private individuals.

[6] Federal agency duties under Section 7 also apply to activities on private lands which require federal agency action, such as funding a project or approving a permit. Therefore, Section 7 constitutes a significant mechanism for federal control of critical habitat modification on private lands.

critical habitat. As the Taung Ming-Lin and Riverside County fire stories described at the beginning of this brief attest, USFWS' "harm" regulation is being enforced on lands which have *not* been designated as critical habitat for listed species. Thus, the "harm" regulation burdens private citizens with the onerous duty under Section 9 of avoiding habitat modifications anywhere they could injure a listed species, while ESA Section 7 directs federal agencies to merely avoid adverse habitat modifications in designated critical habitat areas.

In addition to the inherent conflict with Section 7, if any geographical habitat modification can be banned as a taking without cost to USFWS, Section 5 is unnecessary. Coupling Section 9 with the Section 11 penalties (16 U.S.C. §§ 1540(a)(1), 1540(b)(1)), USFWS would never need, nor ever have any incentive, to implement the Section 5 program for compensatory land acquisition. There is no indication in the legislative history of Section 9 that Congress intended Section 9 to be used as a means of achieving indirectly that which the government must do directly through Section 5. In fact, USFWS' interpretation undercuts the stated congressional intent in enacting Section 5 to "meet th[e] [habitat modification] problem by providing funds for acquisition of critical habitat" since landowners are "understandably unwilling" to provide habitat benefits to listed species "at excessive cost to themselves." 119 Cong. Rec. 30,162 (Sept. 18, 1973) (remarks of Rep. Sullivan, House floor manager) (cited in Pet. App. at 8a).

Sections 5, 7, and 9 form a rational, nonconflicting program only if the term "take" does not encompass habitat modifications. In order to avoid rendering Sections 5 and 7 superfluous, Section 9 must be interpreted accordingly. Thus, a comparison of Section 9 with Sections 5 and 7, demonstrates that USFWS' interpretation of "harm" is beyond the intended scope of the ESA.

D. USFWS' "Harm" Regulation Does Not Conform with Section 11's Penalty Provisions Which Forbid "Knowing" Violations

Section 9 is enforced through Section 11's penalty provisions which provides for both civil and criminal sanctions. 16 U.S.C. §§ 1540(a) (civil penalties); 1540(b) (criminal penalties). Criminal violators who "knowingly" violate Section 9 face sanctions of up to one year in jail and a $100,000 fine for each illegal "take." 16 U.S.C. § 1540(b); 18 U.S.C. §§ 3559, 3571.

The general knowledge standard for criminal liability requires only a general intent to perform an act, not a specific intent to violate the law. *See, e.g., United States v. Nguyen*, 916 F.2d 1016, 1018-19 (5th Cir. 1990). Thus, if a person were out in the woods tracking a species unknown to him to be protected, but, with an intent to "harass ... pursue, hunt, shoot, wound, kill, trap, capture, or collect [that animal] or to attempt to engage in any such conduct" (16 U.S.C. § 1532(19)) the person could be held liable for "knowingly" violating Section 9.

However, applying USFWS' definition of "harm" which forbids habitat modifications, that same person who has intentionally cut a tree in the forest and thereby *unintentionally* injured the habitat of endangered wildlife may be held criminally liable for an intentional "take" under Section 9. Similarly, if a farmer innocently, yet intentionally, plows his private fields and by so doing unintentionally disturbs the geographical habitat of an animal protected under the ESA, that farmer faces imprisonment and massive fines.

Importantly, the ESA "take" definition also penalizes any "attempt" to "take" a member of a listed species. The reference to "attempt" confirms that Congress intended the "take" prohibition to extend only to activities which involve some purposeful effort to injure wildlife.

USFWS' harm regulation has its most potent application in connection with ordinary land use activities, such as agriculture, timber harvesting, and community development. USFWS may publicly announce that a certain type of land use interferes with the breeding or foraging patterns of a listed species and thereby constitutes an illegal "take" under its own definition. This expression of enforcement intent in turn presumably puts the affected landowners "on notice" and renders any further activities by them illegal. This threat of criminal enforcement has a chilling effect on land use activities which may or may not cause actual injury or death to a member of a listed species. As such, USFWS' interpretation of the term "harm" has rendered unlawful a host of otherwise normal and traditional land use activities which may indirectly affect wildlife but are by no means directed at or intended to injure or kill a member of a protected species.

It is unreasonable to think that Congress would have intended Section 11's penalty provisions for "knowing" violations to extend to the types of unintentional "takes" that may occur employing USFWS' definition of "harm" as encompassing "habitat modification." Absent USFWS' regulatory definition of "harm," habitat modification activities certainly would be beyond the reach of Section 9. Thus, USFWS' radical extension of criminal liability to normal land use practices clearly demonstrates that USFWS' definition of "harm" is unreasonable and fails to conform with Section 11's general knowledge requirement for criminal violations.

III

USFWS' "HARM" REGULATION CONTRAVENES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

When it enacted the ESA, Congress sought to achieve the objective of protecting the habitat of endangered species without unnecessarily intruding on private property rights or imposing a disproportionate share of the cost of securing a "public good" upon individual private citizens. As discussed above, Congress decided to provide compensated land acquisition under Section 5, and federal oversight of federally permitted activities on private land under Section 7, as the sole mechanisms provided by the Act for protecting needed habitat on nonfederal lands. The expansive definition of "harm" concocted by USFWS, coupled with USFWS' insistence that it need not designate "critical habitat" to trigger its enforcement powers, has resulted in a profound encroachment upon private property rights and has betrayed that clear congressional intent. As the narratives set out in the beginning of this amicus brief attest, USFWS' implementation of its "harm" regulation has had a definite chilling effect upon the exercise of constitutionally protected private property rights.

This Court has stated:

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568, 575 (1988).

USFWS' definition of "harm" is not only contrary to the spirit and intent of the ESA, its terms and enforcement

also contradict the Fifth Amendment's prohibition against government takings of private property for public use without payment of just compensation. *See* U.S. Const. Amend. V. Thus, this Court should construe Section 9 to avoid the Fifth Amendment takings problems created by USFWS' "harm" definition which is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

This case presents a critical issue of national importance. By interpreting "take" as encompassing "harm" through "habitat modification," USFWS has criminalized seemingly innocent land use activities on millions of acres of private land throughout the United States. Congress never intended such a result under the ESA.

For the reasons stated above, this Court should affirm the decision of the Court of Appeals which struck down USFWS' "harm" regulation as contrary to the ESA.

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Respectfully submitted,

* ROBIN L. RIVETT
JENNIFER M. DEMING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amici Curiae